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No. 326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

J. H. STEPHENSON ET AL., Appellants,

vs.

T. BINFORD ET AL., Appellees.

BRIEF ON BEHALF OF APPELLANTS

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OPINIONS OF THE COURT BELOW

A statutory Three-Judge Court, denying an application for temporary injunction, filed a majority opinion, written by Circuit Judge Hutcheson. At the same time, Judge Kennerly filed his dissenting opinion, both opinions being reported in 53 Fed. (2nd) 509, and both appearing in the Record at pages 129 to 142, inclusive. On final hearing the application for permanent injunction was denied, a memoranda opinion being filed, wherein the views expressed in the earlier opinions were adopted and affirmed—Judge Kennerly still dissenting from the majority opinion. This latter opinion is not yet officially reported, but appears in the Record at page 288.

JURISDICTION

In conformity with the rules, a "Statement of Basis of

* Indications of emphasis herein are ours unless otherwise indicated.

Jurisdiction'' has been filed herein, and an order entered noting probable jurisdiction (not officially reported).

CONCISE STATEMENT OF CASE

This case involves the validity of an Act of the Texas Legislature (complete text in Appendix A of this brief), complaint being made that the Act violates the equal protection clause and the due process clause of the Fourteenth Amendment.

Each of appellants (complainants below) was and is a **private contract carrier exclusively,** operating one, or some few, trucks under **one contract** with **one owner** of goods. This was found by the court below. (Finding of Fact VII, R. 172.) The manner and character of such operations were detailed by each complainant (R. 208-222, inc.), and the status of appellants as **small private contract carriers** is in no way assailed.

Appellants' attack is based on the attempt of the Act to prevent the operation of a truck over the highways pursuant to one private contract with one owner of goods, without compliance with various onerous burdens which have no reasonable relation to highway safety or preservation—but are such as might be required of **common carriers.** Some of these onerous burdens weighted upon the back of the owner of a truck before he may haul his neighbor's goods over the highways for some small compensation are as follows:

(a) He must apply to the Railroad Commission of Texas for what really amounts to a **certificate of public convenience and necessity**—misnamed by the Act a "permit"—issued only after a full hearing

in which applicant must show full compliance with all provisions of the statute. (Section 3.)

(b) The Railroad Commission is forbidden to issue any such "permit" unless it determines that the proposed operation will not impair the efficient public service of authorized common carriers then adequately serving the same territory. [Section 6 (c).]

(c) It is made the duty of the Railroad Commission to supervise and regulate the transportation operation of all Motor Carriers (including **private contract carriers** as well as common carriers), and to fix, prescribe and approve the maximum or minimum, or maximum and minimum, rates, fares and charges of such carriers. [Section 4 (a).]

(d) It is made the duty of the Railroad Commission in prescribing such minimum rates, fares and charges to be collected by such **private contract carriers,** that the same **shall not be less than the rates prescribed for common carriers for the same service.** [Section 6 (aa).]

(e) Before any "permit" may be issued to any motor carrier (including, of course, private contract carriers), and before any such private contract carrier may lawfully operate under such permit, he must file with the Commission insurance policies covering the cargo that will be transported by him as such private contract carrier, the amount of such cargo insurance being prescribed by the Commission. (Section 13.)

(f) It is made the duty of the Railroad Commission to

require all motor carriers (common carriers and private contract carriers alike) to keep a set of accounts, strictly in accordance with such classification of accounts and rules in respect thereto as may be established by the Railroad Commission, and to file reports and such other data as the Commission may deem necessary. [Section 13 (b).]

(g) The Railroad Commission may issue "special permits" to those carriers—either common or contract—who desire to engage in the business of transporting for hire, over the highways of this State, certain commodities such as livestock, mohair, wool, milk, livestock feedstuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain. [Section 6 (d).]

(h) Special driver's licenses must be obtained by the drivers of trucks belonging to motor carriers—both private contract carriers and common carriers alike—regulating the number of hours such driver can continuously operate a truck, and prescribing his rest periods; and the Railroad Commission is given the right to supervise the character of vehicle used, the number and amount of articles that can be transported on any particular vehicle, et cetera—while the shipper-owner is at liberty to operate as he pleases in these respects. [Section 4 (b), Section 6 (cc), and Section 13 (a).]

The court found that pursuant to the provisions of the

Act in question the Railroad Commission promulgated minimum rates to be charged and received by all private contract carriers, and that said rates prescribed as a minimum are higher than, and in excess of, the rates and charges fixed by the several private contracts between appellants and their customers. (Finding of Fact XIII, R. 174.) In its Finding of Fact XIV the court found that each of the appellants have been threatened with arrest and prosecution by enforcement officers of the State for failure to comply with the provisions of the Act. (R. 174.)

Attention is respectfully directed to the agreement by all parties to this suit and fully approved by the court, whereby the application for permanent injunction was heard on affidavits and exhibits—it having been agreed by counsel and by the court that the matter could be heard more satisfactorily in this manner—yet amply developed.

SPECIFICATIONS OF ERROR

All of the errors assigned in connection with this appeal are intended to be urged, but as many of them are directed to some of the court's findings, they are embodied in Appendix B of this brief, and may also be found on page 183 of the Record. The greater portion of the court's findings appearing to appellants to be superfluous and without support in the evidence, errors were assigned as to these, and assignments of error were also directed at the conclusions of law.

SUMMARY OF ARGUMENT

Constitutional guaranties forbid changing by mere legis-

lative fiat the status of a private contract carrier into that of a common carrier against his will.

For a business to be "affected with a public interest," it must be such "as to justify the conclusion that it has been **devoted** to a public use and its use thereby, in effect, **granted** to the public" (Mr. Justice Sutherland), and the term is not so yielding and flexible as to include the business of a private contract carrier, conducted pursuant to a **single** contract with ONE shipper.

Legislative declaration that a certain business is affected with a public interest does not establish it as being such, but "the matter is one which is always open to judicial inquiry."

By providing (a) that no private contract carrier shall be given a permit to operate upon the highways if the Commission be of the opinion that the proposed operation of such carrier will impair the efficient public service of any authorized common carriers then adequately serving the same territory, and (b) that the Railroad Commission shall prescribe the rates such private contract carrier may charge for his services, which rates, in no event, shall be less than the rates prescribed for a common carrier performing substantially the same service—among other provisions—the legislature is attempting to regulate purely private business belonging to appellants, contrary to constitutional guaranties.

The legislature cannot regulate the purely private business of appellants by attempting to invest the Railroad Commission with power and authority to require appellants to file such monthly, annual or other reports and data as the Commission may deem necessary, and to require them to keep accounts strictly in accordance with such classification of accounts and rules as may be pre-

scribed by said Commission. Nor can the legislature "regulate" appellants' said business by requiring them to carry insurance to cover the cargo transported by them.

Permitting certain contract carriers, similarly situated as appellants, but engaged in hauling commodities other than those transported by appellants, to obtain "special permits" from the Railroad Commission without first having to comply with the provisions of the Act, is an arbitrary designation of part only of a general class, not based on anything having reasonable relation to the subject-matter of the Act.

To require private contract carriers to employ only such drivers as have passed a special examination and obtained a special chauffer's license—to regulate the number of hours such drivers can operate trucks and the number of hours such drivers must rest—and to regulate the manner of loading the cargo, et cetera, of private contract carriers—all without placing the shipper owner and others situated exactly as appellants are situated under similar regulations, creates an arbitrary and unreasonable designation of part only of a comprehensive class, not based on anything having relation to the subject-matter of the Act.

ARGUMENT

Point I.

The provisions of House Bill No. 335, passed by the 1931 Legislature of Texas, as applied to appellants, all of whom are private contract carriers, are tantamount to *compelling appellants to dedicate their property to the quasi public use of public transportation* before they can operate their motor vehicles over the high-

ways of the State of Texas, as provided for in their private contracts, resulting in the taking of their property for public use without adequate compensation, and thus depriving them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution.

A casual reading of the Act, and more particularly Sections 6 and 6aa thereof, will suffice to show conclusively that the "permit" required of the private contract carrier before he can use the highways as such is nothing short of a certificate of public convenience and necessity, as that term is ordinarily used and understood in connection with common carrier regulations. Although the word "permit" is used—nevertheless, the substance of the provision is no more and no less than to require a certificate of public convenience and necessity. Subdivision (c) of Section 6, in unmistakable terms, provides that if the Commission be of the opinion that the proposed operation of any applicant for a contract carrier "permit" will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territories, **the permit shall not be granted.** It is submitted that this is but another **form** of placing the private contract carrier's right to operate on the basis of "public convenience and necessity," usually applied to common carriers.

Section 4 (a) of the Act vests the Commission with the power and authority and makes it the **duty** of the Commission to supervise and regulate the transportation of property for compensation or hire by **private contract carriers** on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier

(common carrier and **private contract carrier** alike), in accordance with specific provisions contained in the Act, to prescribe all rules and regulations necessary for the government of all motor carriers, to prescribe rules and regulations for the safety of operation of each of such motor carriers, to require the filing of such monthly, annual or other reports and other data of all motor carriers as the Commission may deem necessary, and to supervise and regulate all motor carriers in all matters affecting the relationship between such carriers and the shipping public, whether in said Act specifically mentioned or not—all these provisions being applicable alike to common carriers and to **private contract carriers.** In other words, as to all of these matters mentioned, the private contract carrier is subjected to the same regulations and placed on the same footing as is the common carrier.

Under the provisions of Section 6 (aa) of the Act, the Commission is vested with power and authority and it is made its **duty** to prescribe rules and regulations governing the operation of **private contract carriers** whom the Act treats as being in competition with common carriers over the highways of the State, and the Commission is required to "prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service." The most potent and effective manner of **controlling** and **regulating** the business of a common carrier is to invest a body or commission with the right to prescribe and dictate the rates such carriers shall be allowed to charge—fixing the maximum and the minimum thereof. That this is both a proper and a necessary method of control over a carrier who tenders his services to the public generally—who has in effect **granted**

the public an **interest** in the **use** of his property and who deals with the public at large, cannot be denied. Because the very **character** of his business means serving the public at large, his charges must of necessity be made uniform.

But here we have the legislature placing, as to these things, the **private contract carrier** on a parity with the **common carrier,** subjecting him to the same method of control as is applied to the common carrier. Though his entire dealings be—not with the public at large—but with a single shipper, his rights of private contract as to rates and charges are wrested from him and, like the common carrier who serves anyone and everyone, the rates he can charge for his services are prescribed. Having been forced to submit to such control and regulation of his business, what has become of his former status as a **private contract carrier?** Though unwilling he may have been, he finds himself converted into a **common carrier.** And why? This court answers that question in the case of Frost v. Railroad Commission, 271 U. S. 583—wherein the State of California sought to subject Frost, engaged under a single private contract in transporting citrus fruit for a stipulated compensation over the public highways, to an act requiring of him a "permit" similar to the one herein involved and subjecting him to rates fixed by the Railroad Commission, in the following words:

> "It is very clear that the Act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. **Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions.** Protection or conservation of the highways is not involved."

This court then branded as being unconstitutional any

effort to transform a private carrier into a common carrier by legislative fiat in the following words:

> "That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt, and is not brought into question here."

(Citing the case of Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 Law Ed. 445, 45 Sup. Ct. Rep. 191, and other cases.)

In the Michigan Public Utilities Commission v. Duke case, 266 U. S. 570, cited in the Frost case, *supra*, the Commission, pursuant to the authority given it by the legislature sought to require of Duke a permit in the nature of a certificate of convenience and necessity and to subject him to regulation as to rates he could charge for his services. Duke operated under three contracts, and was clearly a contract carrier. He did not hold himself out as a carrier for the public. Speaking through Mr. Justice Butler, this court said:

> "Moreover, it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment." (Citing authorities.)

Again, in the case of Smith v. Cahoon, 283 U. S. 553, this court, in passing upon the validity of a Florida statute as applied to a contract carrier, speaking through Mr. Chief Justice Hughes, said:

> "It is true that the statute does not in express

terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the State." (Citing authorities.)

At its last term, this court passed upon the validity of a Kansas statute exacting of both common and private carriers certain requirements, **but applying to the two classes entirely different regulations.** In upholding the Act in the case of Continental Baking Company v. Woodring, United States Supreme Court Advance Opinions of June 20, 1932, 76 L. Ed. ....., this court pointed out with particularity that under the provisions of the Act, "Common carriers and **not private carriers** are required to obtain certificates of public convenience and necessity. **The former and not the latter are put under regulations as to fares and charges,"** * * * "Private motor carriers of property must obtain a license, pay a tax and file a liability insurance policy. The Public Service Commission **has no authority to refuse** a license if the described information is given with the application, the liability insurance policy is filed, and there is compliance with the regulations and payment of the license fee." The Kansas statute **made no attempt to regulate the business of the private carriers,** and the unconstitutional vices inherent in the Act under attack were carefully eliminated in the Kansas statute. The position of that statute, we submit, is clearly on "the other side of the line."

It follows that this court has definitely set at rest the question at issue, and that the Act under inquiry transgresses the constitutional guaranties of appellants.

Point II.

Appellants being carriers for hire under private contract, their business is in no sense "affected with a public interest," hence the provisions of House Bill No. 335, passed by the 1931 Legislature of Texas, compelling appellants to obtain permits which are, in effect, certificates of public convenience and necessity, before they are permitted to use the highways in pursuit of their business, and which said Act regulates their business by (*a*) subjecting them to the rules and regulations of the Railroad Commission, whose duty it is made to fix, prescribe or approve the maximum or minimum, or maximum and minimum, rates, to prescribe rules and regulations necessary for their government, and to require such monthly, annual or other reports and data from them as the Commission may deem necessary, and to regulate them in all matters respecting the relation between them and the shipping public, whether it is specifically mentioned in the Act or not, (*b*) prohibiting them from collecting lesser rates for their services than the minimum prescribed for common carriers for substantially the same service, and (*c*) placing their business generally under the control and regulation of the Railroad Commission—deprives them of their property without due process of law, and in this is in contravention of the Fourteenth Amendment to the Constitution of the United States.

Indeed, the pronouncements of this court, cited under Point I, have so definitely and with such finality branded as unconstitutional all efforts on the part of a State to transform a private carrier into a common carrier against

his will, that appellees, in attempting to save the Texas statute from meeting the same fate as did the California, Michigan and Florida statutes, have of necessity searched arduously for a possible avenue of escape. To be sure, no material difference in this statute and the ones involved in the Frost, Duke and Cahoon cases could be discerned, but the search made by appellees brought to their attention the fact that in those cases the "affected with a public interest" theorem was not invoked nor discussed. Failing to find any other possible basis for sustaining the asserted constitutionality of the Act, appellees have invoked this much overworked and abused doctrine. We submit that the failure of this court to consider it in the cases just referred to was due solely to its absolute inapplicability to the matters at issue in each of those cases, as well as in the case at bar.

In Chas. Wolff Packing Company v. Court of Industrial Relations, 262 U. S. 522, 67 L. Ed. 1103, 43 Sup. Court Reporter, 630, this Honorable Court, to the end that the broad and loose term "affected with a public interest," as it then existed, might be given a clearer and more definite place in American jurisprudence—explained and classified it as follows:

> "Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:
>
> "(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities."
>
> "(a) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbi-

trary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and gristmills."

"(3) Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly."

This court, of late, has had occasion to weigh and determine the status of a number of various businesses, contended by the State to have become "affected with a public interest," and on each occasion the foregoing classification was used as the standard. During recent years, the application of this aphorism has become quite popular with legislatures that were desirous of regulating certain businesses by fixing the prices and rates. In such instances the legislatures have relied on the third of the categories formulated by this court in the Wolff case, *supra*. This is also true in the case at bar. The first classification clearly excludes appellees' theory, for there does not rest on appellants (in the conduct of their business) "the affirmative duty of rendering a public service demanded by any member of the public"; the second so specifically mentions the occupations to which the doctrine is applicable, that appellees realize, we are sure, the futility of attempting to apply it to the business of appellants—so there remains but the third classification, and upon it appellees' contention must be predicated. It, too,

when considered in the light of this court's decisions, holds no applicability to appellants' businesses.

Although a general statement or two contained in the case of Munn v. Illinois, 94 U. S. 113, 126, 24 L. Ed. 77, 84, may have caused for a while some doubt as to the proper application of the term "affected with public interest," this court, during recent years, has given it a fixed and well-defined meaning—at least as to those businesses falling within the third category of the classification made in the Wolff case, *supra.*

The State of New York by statute attempted to regulate the business of re-selling tickets of admission to theaters and other places of amusement, which were obtained either from the box office of the theater or from other brokers dealing in such tickets. The Act declared that the price of or charge for admission to theatres and other places of amusement was a matter affected with a public interest—there having been prevalent considerable fraud and extortion, as well as other abuses, in the conduct of that business. In passing upon the validity of that statute, this court, in the case of Tyson and Bro. v. Banton, 273 U. S. 418, 47 Supreme Court Reporter 426, held the business to be one not affected with a public interest, saying, through Mr. Justice Sutherland, that:

> " * * * A business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been **devoted** to a public use and its use thereby, in effect, **granted** to the public." (Emphasis appears in opinion.)

The foregoing definition, since its formulation, has been applied several times by this court. It has become practically axiomatic. Not long after its decision in the

Tyson case, *supra,* this court was called upon to decide the validity of an Act passed by the legislature of New Jersey, designed to regulate employment agencies, and requiring that everyone operating such an agency must first procure a license from the Commissioner of Labor, and giving the Commissioner of Labor the right to regulate the schedule of fees et cetera. The constitutionality of the Act was assailed before this court in the case of Ribnik v. McBride, 277 U. S. 350, and again the State defended its Act by contending that the business it sought to regulate was one affected with a public interest. The same definition enunciated in the Tyson case was applied, and in holding the business to be one unaffected with a public interest, this court, speaking through Mr. Justice Sutherland, said:

> "Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control." • • •
>
> "To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulations, but not for price fixing, as we have already definitely decided."

In the case of Williams v. Standard Oil Company, 278

U. S. 235, there was before this court for consideration a statute of Tennessee, having as its purpose and effect the fixing of prices at which gasoline could be sold within the State, and requiring permits for such sale to be issued subject to the approval of the Commissioner of Finance, but only at the prices fixed and determined. This court once more was asked to uphold the regulation on the ground that the business was one "affected with a public interest." In answer, this court declared the Act unconstitutional, and, again speaking through Mr. Justice Sutherland, said:

> "As applied in particular instances, its (affected with a public interest) meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been **devoted** to a public use and its use thereby in effect granted to the public. (Citing Tyson v. Banton, supra.) Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance." (Emphasis appears in opinion.)

The State of Oklahoma sought to regulate its ice industry by compelling those who manufacture, sell or distribute the product to first obtain from the Corporation Commission a license, not to be issued except upon proof of the necessity for a supply of ice where the business was to be established, and by authorizing a denial of the application where the existing facilities sufficed to meet the public needs. This court, at its last term, in the case of New State Ice Company v. Liebmann, 76 L. Ed. ....., U. S. Supreme Court Advance Opinion of April 11, 1932, p. 479, held the Act unconstitutional, classing the business

as being a private one, unaffected with any such public interest as would warrant its control by legislation.

We respectfully refer the court to the testimony of each of appellants. Unquestioned by appellees, it shows that each of appellants is operating as a **private contract carrier pursuant to one contract with one single shipper, and that this is the extent of his operations.** (R. 208-222, inc.) His daily operations bring him in contact with only one shipper, from whom his entire compensation is collected. Wherein, may we ask, has his business "been **devoted** to a public use and its use thereby in effect **granted** to the public?" If appellants' few trucks are devoted to a public use, then, we submit, the private contract carrier has become extinct and his business, which imports transporting for an individual or individuals under private contract and not the transporting of goods for the public, has become a thing of the past. If this can be done, the injunction of this court that private carriers cannot be converted into common carriers against their will, by legislative fiat, as announced in the Frost, Duke and Cahoon cases, supra. had just as well been left unwritten.

But it may be said that there are in the State of Texas a rather large number of private contract carriers, that they conduct a large proportion of the transportation operations by motor carriers in the State, that the common carrier motor carrier and the rail carrier suffer by reason thereof, and that surely, under those circumstances and conditions, the private contract carrier's business has become affected with a public interest. We prefer to answer this contention of appellees in this court's own words:

> "A business is not affected with the public interest merely because it is large or because the public are

warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood." (Tyson v. Banton, *supra*, p. 430.)

"In support of the Act under review it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the State of Tennessee; and that it has become necessary and indispensable in carrying on commercial and other activities within the State. But we are here concerned with the **character of the business,** not with its size or the extent to which the commodity is used." (William v. Standard Oil Co., supra, p. 240.)

By unanimous opinion, this court, in the case of Terminal Taxicab Company v. Kutz, 241 U. S. 252, 60 L. Ed. 984, held that such part of the Taxicab Company's business as related to furnishing automobiles from its central garage, on individual orders, generally by telephone, cannot be regarded as a business affected with a public interest and **that the rates charged for such service were not open to inquiry by the Public Utilities Commission.** And the opinion, written by Mr. Justice Holmes, discloses that the court, in deciding the case, assumed that the Taxicab Company, in conducting this particular phase of its business, "generally accepts any seemingly solvent customer." In the conduct and furtherance of the business of each of appellants herein, there is a total absence of such a relation with "any seemingly solvent customer," but the services are confined to ONE SHIPPER. Is not such a business of a taxicab company essentially more apt to have a "public aspect" than that of each of appellants,—and if

so, can it be logically contended, in the light of the above cited decision, that the latter's business is one affected with a public interest?

And again we refer to the statement of this court in the case of Ribnik v. McBride, supra, set out hereinabove, wherein the court said that contentions of existence of imposition, discrimination, extortion, and the like in connection with the conduct of the business, or that the business is one lending itself peculiarly to evils of this character, were matters the court could not consider in ascertaining whether the business was affected with a public interest;—that such facts were grounds for **regulation but not for price fixing.**

May we suggest, that if this business of appellants, so private in character, can be regulated as to rates to be charged, the legislature can find an escape from constitutional inhibitions in practically every instance it may desire to regulate the private business of the citizen. In the Tyson case, *supra,* much stress was laid by the State on the fact that to permit the reselling of theatre tickets for unregulated prices meant the practicing of much fraud, extortion, et cetera. The answer given by this court pointed out the danger of the State beginning to regulate businesses on the ground of asserted "necessity." It was said: "But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and finally as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a

general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship or injustice."

We therefore submit that it is plain and clear that **the operation by any one of appellants of his one truck (or his few trucks—as the case might be) under one contract with one owner of goods, cannot possibly clothe that business with any such public interest as will constitute its DEVOTION to public use.** Indeed the facts here do not present even a "border line" case, and the pretense of "public interest" will be laid aside and the right of private contract upheld.

Point III.

Appellants being carriers for hire under private contract, their business is one wholly unaffected with a public interest, and the legislature cannot by mere legislative declaration convert such purely private business into one affected with a public interest, so as to be able to control and regulate the business of appellants as is attempted to be done through the provisions of House Bill No. 335, passed by the 1931 Legislature of Texas. This enactment regulates the business of appellants by (*a*) demanding of them a permit which is in effect a certificate of public convenience and necessity before they can operate their motor vehicles pursuant to mere private contract; (*b*) prohibiting them from collecting lesser rates for their services than the minimum prescribed for common carriers for the same service; (*c*) subjecting them to rules and regulations of the Railroad Commission, whose duty it is made to fix, prescribe or approve the maximum or minimum, or maximum and

minimum, rates, different from the existing private contract, to prescribe rules and regulations necessary for their government, and to require such monthly, annual or other reports and data from them as the Commission may deem necessary, and to regulate them in all matters affecting the relationship between them and the shipping public, whether it is specifically mentioned in the Act or not; (*d*) requiring, contrary to private contract, that they carry insurance to cover the cargo transported by them; (*e*) requiring that they keep accounts strictly in accordance with such classification of accounts and rules as may be prescribed by the Commission, and to file reports and such other data as the Commission may deem necessary. Said provisions of the Act, as applied to appellants, abrogate the right of private contract, deprive them of their property without due process of law, and in this are in contravention of the Fourteenth Amendment to the Constitution.

The mere declaration by the Texas Legislature that appellants' businesses have become "affected with a public interest," cannot establish them as being such. To the contrary, this court has held that irrespective of what the legislature may have to say on the subject,—no matter what its opinion and declaration may be as respects the matter, it is always a matter for judicial inquiry. In its declaration of policy (Section 22-b), the legislature said:

> "The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest."

The rule has become firmly established that, as was said by this court in the Wolff case, supra, "The mere declara-

tion by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest, are **always** a subject of judicial inquiry."

The foregoing pronouncement made in the Wolff case, **supra**, was reiterated by this court in the Tyson case, **supra**.

Of particular significance, however, are these statements contained in the declaration of policy set out in the statute under discussion:

> " * * * That more stringent regulations should be employed. * * * That discrimination in **rates charged** may be **eliminated;** * * * that the use of the highways for the transportation of property for hire may be restricted to the extent **required by the necessity of the general public.**"

And in this latter statement incorporated in the declaration of policy, we find a conclusive answer to the query as to whether the "permit" provided for in the Act is not, in substance and in fact, a certificate of public convenience and necessity. Suffice it to say that it is manifest from the decisions of this court, cited under Points I and II, that the State is clearly without right to carry out the quoted declarations through the provisions of the Act in question.

The argument that the Act in question is valid because the contract carrier pursues his business by reason of a mere privilege granted him at the hands of the State, and that therefore the latter could entirely prohibit the use of the highways by the carrier as such, is likewise unten-

able. Because it can prohibit, does not empower it to limit unconstitutionally. The precise argument was made in the Frost case, *supra,* and in reply this court said:

> "It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Application was given the foregoing rule, in virtually the same words, in the case of Williams v. Standard Oil Company, *supra.*

As was so tersely stated in the Frost case, supra, "protection or conservation of the highways is not involved," and when business is regulated through the medium of controlling rates, it is then plain, that "its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions." This court is aware of the companion enactment (House Bill 336) to the Act in question. That Act had for its purpose protection and conservation of the highways, in that it limited the height, width and length of the motor vehicles traversing the highways, and also limited the net load of such vehicles to a **maximum of 7,000 pounds.** The Act received this court's scrutiny in the case of Sproles v. Binford, at its last term, and was held constitutional (U. S. Supreme Court Advance Opinions, June 20, 1932, 76 L. Ed.....). Most of the "grievances" advanced

in appellees' testimony relate to protection and conservation of the highways,—conditions fully and amply met through the enactment of this companion bill, House Bill 336. The remainder of the "grievances" pertain to competitive conditions and to the asserted value of rate fixing, —matters the State has **no right to regulate.**

Point IV.

House Bill No. 335, passed by the 1931 Legislature of Texas, requires that appellants obtain a permit which is in the nature of a certificate of public convenience and necessity, and subjects appellants to other regulations before they can lawfully operate upon the highways, which said requirements are not made as to certain designated private carriers similarly situated, and in this appellants are denied the equal protection of the laws, in violation of the Fourteenth Amendment.

Section 6 (d) of the Act authorizes the Railroad Commission to issue special permits, conditioned and restricted as the Commission may deem proper, to those persons who desire to engage in the business of transporting for hire over the highways of the State, livestock, mohair, wool, milk, livestock feedstuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain,—without requiring of these specially-privileged carriers a compliance with the onerous provisions of obtaining a permit in the nature of a certificate of public convenience and necessity, regulation of rates, method of loading, number of containers, et cetera.

Appellants are not engaged in the business of transport-

ing for hire over the highways of this State the exempted commodities mentioned above. The particular shipper with whom each of appellants has his respective contract, requires the hauling of a large variety of commodities other than those exempted, but many of which are quite similar. And merely because the operations of each of appellants are not confined to the transporting of a commodity included in the class exempt in the Act, he is compelled to make full compliance with the burdensome provisions of this Act.

If the State Legislature, in enacting laws, arbitrarily or unjustly discriminates between persons or commodities that are similarly conditioned with reference to the things legislated upon, then the organic provisions securing property rights are violated. No greater burdens may be laid upon one thing than are laid upon others in the same situation with respect to the subject legislated upon. See Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923.

Arbitrary selection can never be justified by calling it "classification." The classification must be one which is based upon some difference which bears a proper relation to the attempted classification. See Copping v. A. A. Godard, 183 U. S. 79, 46 L. Ed. 92, and cases there cited.

This court said in the case of Frost v. Corporation Commission, 278 U. S. 515:

> "The classification, in order to be valid, must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced must be treated alike. F. S. Royster Guano Co. v. Virginia, 253 U. S. 412; Air-way Elec. Appliance Corp. v. Day, 266 U. S. 71; Schlesinger v. Wisconsin, 270 U. S. 230, 43 A. L. R. 1224. That is to say mere difference is not enough; the attempted classification must always rest upon some difference which bears a reasonable

and just relation to the Act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. G. C. & S. F. R'y Co. v. Ellis, 165 U. S. 150; Louisville Gas & E. Co. v. Coleman, 72 L. Ed. 770."

In Smith v. Cahoon, *supra*, this court held unconstitutional an effort by the Legislature of Florida to make exemptions of the very kind contained in the Act in question. In the opinion it is said:

"The principle that the State has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this court (citing a number of authorities). But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discrimination and what is arbitrary, regard must be had to the particular subject of the State's action. In the present instance the regulations as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety.

"This is a matter of grave concern as the highways become increasingly crowded with motor vehicles and we entertain no doubt of the power of the State to insist upon suitable protection of the public against injury through the operations over the highways of carriers for hire, whether they are common carriers or private carriers. **But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those carrying for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, tea or coffee or groceries, in general, or other useful commodity.** So far as the statute was designated to safeguard the public with respect to the highway, we think that the discrimination here made between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and the car-

rier, such as appellant, was wholly arbitrary and constituted violation of appellant's constitutional rights. Such a classification is not based on anything having relation to the purpose for which it is made."

Point V.

House Bill No. 335, passed by the 1931 Legislature of Texas, denies to appellants the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States, in that it regulates their business and the conduct thereof on the highways of the State of Texas, in a number of particulars, which said regulations it does not apply to persons using the highways who are transporting their own commodities under substantially the same conditions.

The Act subjects appellants' drivers to a special examination and chauffeur's license [Section 4 (b)], regulates the number of hours which appellants' drivers can continuously operate trucks, as well as the required rest period [Section 6 (cc)], supervises the character of vehicles appellants can use in their said transportation businesses, the number and amount of articles that can be transported on any particular vehicle by them, as well as the manner of loading their trucks [Section 13 (aa)], the manner of bookkeeping [Section 13 (b)], and, in fact, every phase of appellants' said businesses [Section 4 (a)]. Under the provisions of the Act, persons using the highways under substantially the same conditions, but who are transporting their own commodities—commonly known as the "Shipper-Owner"—are not subjected to these regulations. It is submitted that such legislation is wholly ar-

bitrary, and unjustly discriminates against private contract carriers, such as appellants, and constitutes a denial to them of the equal protection of the laws. The statements made and authorities cited under Point IV are equally as applicable under this point, and a reference is respectfully made to same.

CONCLUSION

We submit that for the reasons set forth above the Act in question is unconstitutional and void; that the judgment of the court below should be in all respects reversed, and appellants' application for injunction be granted as prayed for.

Respectfully submitted,

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APPENDIX "A"

"An Act to amend chapter 314, General Laws of the State of Texas, Forty-first Legislature, Regular Session, as amended by Chapter 24 of the General Laws of the Second Called Session thereof, so as to further regulate motor carriers transporting property for hire over the public highways; defining the terms 'person,' 'Commission,' 'Highway Commission,' 'public highway,' 'certificate,' 'permit,' 'motor carrier,' and 'contract carrier'; placing all motor carriers under the jurisdiction of the Railroad Commission of the State of Texas; providing that no motor carrier shall hereafter operate as a common carrier without having a certificate of convenience and necessity and that no motor carrier shall hereafter operate as a contract carrier without having a permit; giving to the Railroad Commission of the State of Texas power and imposing upon it the duty to fix, prescribe or approve maximum or minimum or maximum and minimum rates, fares and charges for motor carriers doing business as common carriers and minimum rates, fares and charges for motor carriers operating as contract carriers, to require all motor carriers to keep certain accounts and to file such reports as the Commission may deem necessary, to require each operator of a motor-propelled vehicle operated by a motor carrier to have a driver's license, and prescribing fees therefor, and to regulate motor carriers in all other matters affecting their relationship with the shipping public, and so as to relieve existing and future undue burdens on the highways; making it unlawful for a motor carrier to operate a motor-propelled vehicle unless such vehicle is operated by a driver holding an unrevoked and uncancelled license issued by the Commission; giving the Commission the power and imposing upon it the duty to approve or disapprove the nature and character of equipment used and the amount and character of tonnage carried and the number, size and method of loading containers of any commodity carried on any vehicle operated by a motor carrier under a permit or certificate; providing for the sale, lease, assignment or transfer of certificates under certain conditions and subject to the approval or

disapproval of the Commission; prescribing the length of time a motor carrier may require or permit any driver or helper to remain on continuous duty with exception in cases of a certain specified emergency and providing venue for prosecution for violations of this provision; providing for the carrying and displaying of identification cards setting out the certificate or permit number and certain other information in the cab of each motor vehicle operated under this act, and making it unlawful to display such card or other insignia of authority from the Commission after the same has expired or been cancelled; providing the method for securing of certificates of convenience and necessity and permit, the requisites of applications therefor, for hearing on said applications, for the summoning of, the attendance of, the examining of and the fees for witnesses, for the filing of written opinions by the Commission in contested hearings, and giving the Commission power under certain conditions to revoke, suspend or amend any certificate or permit and providing for appeals from the decisions of the Railroad Commission of the State of Texas; providing the method for securing of certificates and permits by motor carriers lawfully operating under the present law; providing that no permit shall be granted to any person holding a permit and that no vehicle shall be operated with both a permit and a certificate; providing for the issuance of special permits to persons engaged in transporting certain specified commodities; providing for the issuance of special identification plates for motor carrier vehicles, and prescribing fees therefor; providing for the payment of annual fees for each motor vehicle operated by a motor carrier for the creation of a fund for administering the act; providing that no person now lawfully authorized to operate as a motor carrier under the present law and who has paid annual fees for the year ending September 1, 1931, shall be required to pay any additional fees; providing a portion from sales of certificates shall go to the State Treasurer for the benefit of the State Highway Fund; appropriating a fund for the administration of the act in the event revenues from licenses and fees are insufficient for that purpose; requiring that, before any certificate or per-

mit shall be issued and before any motor carrier may lawfully operate, such motor carrier shall file with the Commission bonds and insurance policies covering loss or damages from personal injury or loss of or injury to property and containing certain designated terms, and providing that any permit will automatically expire if such insurance is not kept in force, and providing that each motor carrier shall protect his employes by taking out workmen's compensation insurance; giving any authorized inspector for the Commission power and authority to make arrests for violations of this act; making the violation of any provision of the act or any lawful ruling or order of the Commission a misdemeanor and imposing a penalty, and, in addition, providing for the recovery of penalties by the State for the violation of any provision of this act or for the violation of any lawful rule or order of the Commissioner; providing for the remedy or injunction to enforce the act; making the giving or receiving of any commission or other consideration as an inducement to secure the transportation of property by motor carrier a misdemeanor and imposing a penalty; making the giving of any common carrier or the receiving by any shipper of any rebate, directly or indirectly, a misdemeanor and imposing a penalty; making the charging, demanding, contracting for, collecting or receiving by any motor carrier operating as a contract carrier, of a less compensation for any service than is prescribed therefor by the Commission or the procuring, aiding or abetting any contract carrier in so doing a misdemeanor and imposing a penalty; declaring the public policy of this State with reference to the business of transporting property for hire by means of motor vehicles over the highways of this State and declaring that the business of a motor carrier is impressed with the public interest; repealing all laws and parts of laws in conflict herewith; providing that if any part of this act is declared unconstitutional such decision shall not affect the validity of the remaining portions of the act and declaring an emergency."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. That Section 1 of Chapter 314, General Laws of the State of Texas, Forty-first Legislature, Regular Session, as amended by Chapter 24 of the General Laws of the Second Called Session thereof, regulating motor carriers transporting property over public highways, be and the same is hereby amended to read as follows:

SECTION 1. Definitions.—When used in this act unless expressly stated otherwise:

"(a) The term 'person' means and includes an individual, a firm, copartnership, corporation, company, an association or a joint stock association.

"(b) The term 'Commission' means the Railroad Commission of the State of Texas.

"(c) The term 'Highway Commission" means the Board of Highway Commissioners of the State of Texas.

"(d) The term 'public highway' means every street, road or highway in this State.

"(e) The term 'certificate' means certificate of public convenience and necessity issued under this act.

"(f) The term 'permit' means the permit issued to contract carriers under the terms of this act.

"(g) The term 'motor carrier' means any person, firm, corporation, company, copartnership, association or joint stock association, and their lessees, receivers or trustees appointed by any court whatsoever, owning, controlling, managing, operating or causing to be operated any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State, where in the course of such transportation a highway between two or more incorporated cities, towns or villages is traversed; provided, that the term 'motor carrier' as used in this act shall not include, and this act shall not apply to motor vehicles operated exclusively within the incorporated limits of cities or towns.

"(h) The term 'contract carrier' means any motor carrier as hereinabove defined transporting property for compensation or hire over any highway in this State other than as a common carrier."'

SEC. 2. That Section 2 of said chapter be and the same is hereby amended to read as follows:

"SECTION 2. No motor carrier, as defined in the preceding section, shall operate any motor-propelled vehicle for the purpose of the transportation or carriage of property for compensation or hire over any public highway in the State except in accordance with the provisions of this act; provided, however, that nothing in this act or any provisions thereof shall be construed or held to in any manner affect, limit or deprive cities and towns from exercising any of the powers granted them by Chapter 147, pages 307 to 318, inclusive, of the General Laws of the State of Texas, passed by the Thirty-third Legislature, or any amendments thereto."

SEC. 3. That Section 3 of the said chapter be and the same is hereby amended to read as follows:

"SECTION 3. No motor carrier shall, after this act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this act, a certificate of public convenience and necessity pursuant to a finding to the effect that the public convenience and necessity requires such operation. No motor carrier shall, after this act goes into effect, operate as a contract carrier without first having obtained from the Commission a permit so to do, which permit shall not be issued until the applicant shall have in all things complied with the requirements of this act."

SEC. 4. That Section 4 of said chapter be and the same is hereby amended to read as follows:

"SECTION 4 (a). The Commission is hereby vested with power and authority and it is hereby made its duty to supervise and regulate the transportation of property for compensation or hire by motor vehicle on any public highway in this State, to fix, prescribe or approve the maximum or minimum or maximum and minimum rates, fares and charges of each motor carrier in accordance with the specific provisions herein contained, to prescribe all rules and regulations necessary for the government of motor carriers, to prescribe rules and regulations for the safety of operations of each of such motor carriers, to require the filing of such monthly, annual or other reports and oth-

er data of motor carriers as the Commission may deem necessary, to prescribe the schedules and services of motor carriers operating as common carriers, and to supervise and regulate motor carriers in all matters affecting the relationship between such carriers and the shipping public whether herein specifically mentioned or not.

"(b) The Commission is hereby vested with power and authority and it is hereby made its duty to require that each driver of a motor-propelled vehicle owned or operated by a motor carrier under the provisions of this act shall have a driver's license, which license shall be issued by the Commission pursuant to an examination testing the ability and fitness of the applicant and under such rules and regulations as the Commission may prescribe; provided, that every driver aforesaid shall acquire a driver's license within thirty (30) days after this act takes effect and shall annually thereafter on or before the anniversary of the date of the original license acquire a renewal thereof. Such license issued shall be for a term of one year. The Commission is empowered further to issue temporary licenses in case of emergency, for such term as the Commission may deem expedient; provided, such term shall not exceed ten (10) days and there shall be no right or privilege of renewal thereof. The Commission is hereby authorized to collect a fee of one dollar ($1.00) for each annual license fee or renewal. The Commission may suspend or revoke any such license for cause after notice and public hearing. It shall be unlawful for any motor carrier to operate a motor-propelled vehicle in this State unless such vehicle is operated by a driver holding an unrevoked and uncancelled license issued by the Commission.

"(c) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the shipping public that may be necessary in the interest of the public.

"(d) The Commission is further authorized and empowered, and it shall be its duty, to supervise and regulate motor carriers in all matters whether specifically mentioned herein or not so as to carefully preserve, foster and regulate transportation and to relieve the existing

and all future undue burdens on the highways arising by reason of the use of the highways by motor carriers, adjusting and administering its regulations in the interests of the public.

"The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the recommendations of the local government of any municipality through or between which motor carriers operate."

SEC. 5. That Section 5 of said chapter be, and the same is hereby, amended to read as follows:

"SEC. 5. No motor carrier shall hereafter operate as a common carrier for the transportation of property for compensation or hire over the public highways of this State without first having obtained from the Commission, under the provisions of this Act, a certificate declaring that the public convenience and necessity requires such operation; provided, however, the Commission shall, without application or hearing when this Act goes into effect, issue all motor carriers then operating lawfully under permanent certificates of public convenience and necessity heretofore issued to them, certificates in lieu of the certificates issued under the terms of the former law covering the same routes that said common carrier shall have been operating over, and no more.

"Any certificate held, owned or obtained by any motor carrier operating as a common carrier under the provisions of this Act may be sold, assigned, leased, transferred or inherited; provided, however, that any proposed sale, lease, assignment or transfer shall be first presented in

writing to the Commission for its approval or disapproval, and the Commission may disapprove such proposed sale, assignment, lease or transfer if it be found and determined by the Commission that such proposed sale, assignment, lease or transfer is not in good faith or that the proposed purchaser, assignee, lessee or transferee is not able or capable of continuing the operation of the equipment proposed to be sold, assigned, leased or transferred in such manner as to render the services demanded by the public necessity and convenience on and along the designated route, or that said proposed sale, assignment, lease or transfer is not best for the public interest; the Commission in approving or disapproving any sale, assignment, lease or transfer of any certificate, may take into consideration all of the requirements and qualifications of a regular applicant required in this act and apply same as necessary qualifications of any proposed purchaser, assignee, lessee or transferee; provided, however, that in case a certificate is transferred that the transferee shall pay to the Commission a sum of money equal to ten per cent (10%) of the amount paid as a consideration for the transfer of the certificate, which sum of ten per cent (10%) shall be deposited in the State Treasury to the credit of the highway fund of the State; provided further, that any certificate obtained by any motor carrier or by any assignee or transferee shall be taken and held subject to the right of the State at any time to limit, restrict or forbid the use of the streets and highways of this State to any holder or owner of such certificate. Every application filed with the Commission for an order approving the lease, sale or transfer of any certificate of convenience and necessity shall be accompanied by a filing fee in the sum of twenty-five dollars ($25.00) which fee shall be in addition to the other fees and taxes and shall be retained by the Commission whether the lease, sale or transfer of the certificate of convenience and necessity is approved or not."

Section 6. That Section 6 of said chapter be and the same is hereby amended so as to read as follows, and the same is hereby further amended by adding Section 6 aa, Section 6 bb, and Section 6 cc.

"SECTION 6. (a) No motor carrier now operating as a contract carrier or that may hereafter desire to engage in the business of a contract carrier shall so operate until it shall have received a permit from the Commission to engage in such business and such permit shall not be issued until the applicant shall have in all things complied with the requirements of this act; nor shall such permit be issued unless the character of business being done or to be done by the applicant strictly conforms with the definition of a contract carrier. The Commission shall have the power to suspend for ten (10) days any existing permit after notice and hearing and to revoke any existing permit when it appears that such permit holder has disobeyed or violated any provisions of this act or of general laws regulating motor vehicles or violated any rule or regulation of the Commission authorized by this act.

"(b) No application for a permit shall be considered by the Commission unless it be reduced to writing and set forth the following facts:

"(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

"(2) The application shall set forth the nature of the transportation in which the applicant wishes to engage, stating substantially the territory to be covered by the operation, and including the condition and character of the roads over which the transportation is to be performed.

"(3) It shall give a description of each vehicle which the applicant intends to use, including weight and size of vehicle and its carrying capacity.

"(c) No application for permit shall be granted by the Commission until after a hearing nor shall any such permit be granted if the Commission shall be of the opinion that the proposed operation of any such contract carrier will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory; provided, however, any person now lawfully operating as a Class 'B' operator in this State who may desire to continue in the business of a motor carrier shall file an application for a permit or

certificate under the terms of this act within thirty (30) days after the effective date hereof, and it shall be the duty of the Commission to determine such applications forthwith and such applicants may, subject to the provisions of this Act and to the orders, rules, rates and regulations of the Commission continue to operate as motor carriers pending the determination by the Commission of such application.

"(d) The Railroad Commission is hereby given authority to issue upon application to those persons who desire to engage in the business of transporting for hire over the highways of this State livestock, mohair, wool, milk, livestock feedstuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain special permits upon such terms, conditions and restrictions as the Railroad Commission may deem proper, and to make rules and regulations governing such operations keeping in mind the protection of the highways and the safety of the traveling public; provided, that if this act or any section, sub-section, sentence, clause or phrase thereof, is held unconstitutional and invalid by reason of the inclusion of this sub-section, the legislature hereby declares that it would have passed this act and any such section, sub-section, sentence, clause or phrase thereof without this sub-section."

"Section 6 aa. The Commission is hereby vested with power and authority and it is hereby made its duty to prescribe rules and regulations covering the operation of contract carriers in competition with common carriers over the highways of this State and the Commission shall prescribe minimum rates, fares and charges to be collected by such contract carriers which shall not be less than the rates prescribed for common carriers for substantially the same service.

"Section 6 bb. No application for permit to operate as a contract carrier shall be granted by the Commission to any person operating as a common carrier and holding a certificate of convenience and necessity, nor shall any application for certificate of convenience and necessity be granted by the Commission to any person operating as a contract carrier nor shall any vehicle be operated by

any motor carrier with both a permit and a certificate.

"SECTION 6 cc. No motor carrier operating in whole or in part in this State under a certificate or permit issued by the Railroad Commission of Texas, or any officer or agent of such motor carrier, shall require or knowingly permit any truck driver or his helper to drive or operate a truck for a period longer than fourteen (14) consecutive hours; and whenever such driver or helper shall have been continuously on such duty for fourteen (14) hours, he shall be relieved and shall not be required or knowingly permitted to again go on duty until he has had at least eight (8) consecutive hours off duty; and no such driver or helper who has been on such duty fourteen (14) hours in the aggregate in any twenty-four (24) hour period shall be required or knowingly permitted to continue or again go on duty without having had at least eight (8) consecutive hours off duty; and venue for prosecution under this section shall lie in the county of the residence of the defendant; provided, that in cases of emergency caused by the act of God, the foregoing restrictions as to hours shall not apply."

SEC. 7. That Section 7 of said chapter be and the same is hereby amended to read as follows:

"SECTION 7. For the purpose of defraying the expenses of administering this act every motor carrier operating as a contract carrier shall, at the time of the issuance of a permit to him and annually thereafter on or between September 1st and September 15th of each calendar year pay a special fee of ten dollars (10) for each motor vehicle operated or to be operated by such motor carrier. If the permit herein referred to is issued after the month of September of any year the fee paid shall be prorated to the remaining portion of the year ending August 31st following, but in no case less than one-fourth (¼) the annual fee. Provided, that no person now authorized by law to operate as a Class 'A' or Class 'B' motor carrier, and who has paid annual vehicle fees required by law of the holders of certificates or permits for the year ending September 1, 1931, shall be required to pay any additional vehicle fees or additional fees incident to the issuance of certificates or permits required in this act, for the year

ending September 1, 1931, in lieu of those now required by law. Every application for a permit shall be accompanied by a filing fee in the sum of ten dollars ($10.00) which fee shall be in addition to other fees and taxes and shall be retained by the Commission whether the permit be granted or not."

SECTION 8. That Section 8 of said chapter be and the same is hereby amended to read as follows:

"SECTION 8. The Commission is hereby vested with power and authority, and it is hereby made its duty upon the filing of an application for a certificate of public convenience and necessity to ascertain and determine under such rules and regulations as it may promulgate, after considering existing transportation facilities, and the demand for, or need of additional service, if there exists a public necessity for such service, and if public convenience will be promoted by granting said application and permitting the operating of motor vehicles on the highways designated in such application as a common carrier for hire."

SEC. 9. That Section 9 of said chapter be and the same is hereby amended to read as follows:

"SECTION 9. The Commission shall ascertain and determine if a particular highway or highways designated in an application for a certificate of public convenience and necessity are of such type of construction or in such state of repair, or subject to such use as to permit of the use sought to be made by the applicant, without unreasonable interference with the use of such highways by the general public for highway purposes. And if the Commission shall determine, after hearing, that the service rendered by existing transportation facilities or agencies is reasonably adequate, or that public convenience would not be promoted by granting of said application, and the operation of motor vehicles on the public highways therein designated, or that such highway or highways are not in such state of repair, or are already subject to such use as would not permit of the use sought to be made by the applicant without unreasonable interference with the use of such highways by the general public for highway purposes, then in either or any of such events, said application may be denied and said certificate refused, otherwise the ap-

plication shall be granted and the certificate issued upon such terms and conditions as said Commission may impose and subject to such rules and regulations as it has or may thereafter prescribe.

"In determining whether or not a certificate should be issued to a motor carrier, the Commission shall give weight and due regard to:

"(1) Probable permanence and the quality of service offered by the applicant.

"(2) The financial ability and responsibility of the applicant and its organization and personnel.

"(3) The character of vehicles and the character and location of depots or termini proposed to be used.

"(4) The experience of the applicant in the transportation of property and the character of the bond or insurance proposed to be given to insure the protection of the public."

SEC. 10. That Section 10 of said chapter be and the same is hereby amended to read as follows:

"SECTION 10. No application for a certificate of public convenience and necessity shall be considered by said Commission unless it be in writing and set forth the following facts:

"(1) It shall contain the name and address of the applicant and the names and addresses of its officers, if any, and shall give full information concerning the financial condition and physical properties of the applicant.

"(2) The complete route or routes over which the applicant desires to operate, together with the description of each vehicle which the applicant intends to use.

"(3) A proposed schedule of service and a schedule of rates to be charged between the several points or localities to be served.

"(4) It shall be accompanied by a plat or map showing the route or routes over which the applicant desires to operate, on which plat or map shall be delineated the line or lines of any existing transportation company or companies serving such territory, and shall point out the inadequacy of existing transportation facilities or service, and shall specify wherein additional facilities or service

are required and would be secured by the granting of said application.

"The Commission, in prescribing and adopting rules and regulations and in forming its conclusions and in prescribing its orders, shall invite the Highway Commission's opinion on the condition of the public highways involved and the ability of said highways to carry the existing and proposed additional traffic, and the Commission shall give due and proper consideration to the orders, regulations, ordinances or recommendations of the Highway Commission of Texas; provided, however, nothing herein contained shall be deemed to restrict the powers of the Highway Commission under existing laws. The Commission shall also give due and proper consideration to the recommendations of the commissioners courts of the several counties and to the recommendations of the local government of any municipality through or between which motor carriers operate."

SEC. 11. That Section 11 of said chapter be, and the same is hereby, amended to read as follows:

"SEC. 11. Upon the filing of said application for a certificate or permit, the Commission shall fix a time and place for hearing, and the place of hearing shall be in the city of Austin, Texas, unless otherwise ordered by the Commission. Notice of the filing of said application, and the time and place of hearing, shall be given by mail not less than ten (10) days, exclusive of the day of mailing, before such hearing, addressed to the owner or owners of existing transportation facilities serving such territory as applicant seeks to serve, as well as to the Highway Commission of the State of Texas, the county judge or judges of the counties and to the mayor of any incorporated city or town through which such carrier seeks to operate."

SEC. 12. That Section 12 of said chapter be, and the same is hereby, amended to read as follows:

"SECTION 12. (a) The hearing on an application for certificate or permit shall be conducted under such rules and regulations as the Commission may prescribe, and the parties interested, including the Highway Commission of this State, may appear either in person or by counsel and present such evidence and argument as they may de-

sire and as the Commission may deem pertinent in favor of or against the granting of such application. It shall be the duty of the Highway Commission, upon request of the Commission, to furnish information relating to the highway or highways designated in such application, as well as such other information as the Commission may deem pertinent to the hearing. After hearing and such investigation as the Commission may make, it shall be the duty of the Commission to grant or refuse the application, and, in any contested hearing, the Commission shall, along with its order, file a concise written opinion setting forth the facts and grounds for its action, and such opinion shall be admissible as evidence on any appeal taken therefrom; upon request of any party at interest in a contested hearing of any nature, the proceedings shall be taken down and reported by a reporter under the direction of the Commission.

"(b) The Commission at any time after hearing had, upon notice to the holder of any certificate or permit and after opportunity given such holder to be heard, may by its order revoke, suspend or amend any certificate or permit issued under the provisions of this act wherein such hearing the Commission shall find that such certificate or permit holder has discontinued operation or has violated, refused or neglected to observe the Commission's lawful orders, rules, rates or regulations or has violated the terms of said certificate or permit; provided, that the holder of such certificate or permit shall have the right of appeal as provided in this act."

SEC. 13. That Section 13 of said chapter be, and the same is hereby, amended to read as follows:

"SEC. 13. Before any permit or certificate of public convenience and necessity may be issued to any motor carrier, and before any motor carrier may lawfully operate under such permit or certificate, as the case may be, such motor carrier shall file with the Commission bonds and insurance policies issued by some insurance company, including mutuals and reciprocals or bonding company authorized by law to transact business in Texas, in an amount to be fixed by the Commission under such rules and regulations as it may prescribe, which bonds and insurance

policies shall provide that the obligor therein will pay to the extent of the face amount of such insurance policies and bonds all judgments which may be recovered against the motor carrier so filing said insurance policies and bonds, based on claims for loss or damages from personal injury or loss of, or injury to, property occurring during the term of said bonds and policies and arising out of the actual operation of such motor carrier, and such bonds and policies shall also provide for successive recoveries to the complete exhaustion of the face amount thereof, and that such judgments will be paid by the obligor in said bonds and insurance policies irrespective of the solvency or insolvency of the motor carriers; provided, however, such bonds and policies shall not cover personal injuries sustained by the servants, agents or employes of such motor carrier; provided further, that in the event the insured shall abandon his permit or certificate and leave the State, a claimant, asserting a claim within the provisions of said bonds or policies, may file suit against the company executing such bond or policies in a court of competent jurisdiction without the necessity of making the insured a party to said suit. Provided, however, that the Commission shall not require insurance covering loss of or damage to cargo in amount excessive for the class of service to be rendered by any motor carrier. Each such motor carrier shall, on or before the date of the expiration of the term of any policy or bond so filed by him, file a renewal thereof, or new bonds and policies, containing the same terms and obligations of the preceding bonds and policies, and shall each year thereafter on or before the expiration date of the existing bonds and policies, file such renewal policies and bonds so as to provide continuous and unbroken protection to the public having claims against such motor carrier, and in the event such renewal bonds and policies are not so filed, the permit or certificate of public convenience and necessity of such motor carrier shall automatically expire and cease to exist.

"Each motor carrier shall also protect his employes by taking out workmen's compensation insurance, either as provided by the Workmen's Compensation Laws of the State of Texas, or in a reliable insurance company author-

ized to write workmen's compensation insurance approved by the Commission."

SEC. 14. That Section 13a of said chapter be, and the same is hereby amended to read as follows:

"SEC. 13a. The Commission is vested with power and authority, and it is hereby made its duty, to approve or disapprove the nature and character of the equipment to be used under any permit or certificate and the amount and character of tonnage which may be hauled thereunder on any motor vehicle, trailer or semi-trailer used under such permit or certificate, and in approving the amount and character of tonnage to be hauled on any such vehicles, trailers or semi-trailers under any permit or certificate, it may fix the number and size of boxes, packages, barrels or bales of any particular commodity to be transported on any such vehicles, trailers or semi-trailers, under such permit or certificate, and the method of loading such boxes, packages, barrels or bales of such commodity on the motor vehicles, trailers and semi-trailers to be used under such permit or certificate; provided, however, said Commission shall not authorize the use of any equipment of greater dimensions than otherwise permitted by law, nor any tonnage of greater weight than otherwise permitted by law.

"Provided, that if this section is for any reason held to be unconstitutional and invalid, such decision shall not affect the validity of the remaining portions of this act, and the legislature hereby declares that it would have passed this act and each section, sub-section, sentence, clause or phrase thereof, irrespective of the fact that this section be declared unconstitutional; provided further, that if this act or any section, sub-section, sentence, clause or phrase thereof is held to be unconstitutional and invalid by reason of the inclusion of this section, the legislature hereby declares that it would have passed this act and any such section, sub-section, sentence, clause or phrase thereof without this section."

SEC. 15. That Section 13a of said chapter be, and the same is hereby, further amended by adding thereto the following section, to be known as Section 13b:

"SECTION 13b. The Commission is hereby vested with

power and authority and it is hereby made its duty to require all motor carriers to keep a set of accounts strictly in accordance with such classification of accounts and rules in respect thereto as may be established by the Commission and to file reports and such other data as the Commission may deem necessary, and which said accounts shall be open to the inspection of the Commission or its representatives at all times."

SEC. 16. That Section 15 of said chapter be and the same is hereby amended, by adding thereto the following section to be known as Section 15a:

"SECTION 15a. Provided that any motor carrier at interest in any hearing may submit to the Commission the names and addresses of witnesses which he or it desires to use in such hearing, and it shall be the duty of the Commission to summon such witnesses."

SEC. 17. That Section 16 of said chapter be, and the same is hereby amended to read as follows:

"SECTION 16. (a) Every officer, agent, servant, or employe of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand, or requirement of the Commission shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00), and the violations occurring on each day shall constitute a separate offense.

"(b) Every officer, agent, servant, or employe of any corporation and every other person who violates or fails to comply with or procures, aids or abets in the violation of any provision of this act or who violates or fails to obey, observe or comply with any lawful order, decision, rule or regulation, direction, demand or requirement of the Commission, shall pay a penalty not exceeding one hundred dollars ($100.00) for each and every day of such violation. Such penalty shall be recovered in any court of competent jurisdiction in the county in which the violation occurs. Suit for such penalty or penalties shall be instituted and conducted by the Attorney General of the

State of Texas, or by the county or district attorney in the county in which the violation occurs in the name of the State of Texas.

"(c) Upon the violation of any provision of this act, or upon the violation of any rule, regulation, order or decree of the Commission promulgated under the terms of this act, any district court of any county where such violation occurs shall have the power to restrain and enjoin the person, firm or corporation so offending from further violating the provisions of this act or from further violating any of the rules, regulations, orders and decrees of the Commission. Such injunctive relief may be granted upon the application of the Commission, the Attorney General or any district or county attorney. No bond shall be required when such injunctive relief is sought upon the application of the Commission, Attorney General or any district or county attorney. Such relief may be granted in suits for penalties as provided in subdivision (b) of this section, but a suit for penalty shall not be a condition precedent to the injunctive relief provided by this subdivision.

"(d) Any authorized inspector for the Commission shall have the power and authority to make arrests for any violations of this act and it shall be the duty of all judges, prosecuting attorneys and peace officers of the counties and municipalities of this State to assist in the enforcement of this act.

"(e) The Commission shall prescribe an identification card which must be displayed within the cab of each motor vehicle, setting out the certificate or permit number and the route or territory over which the vehicle is authorized to operate, giving the name and address of the owner of said certificate or permit. It shall be unlawful for the owner of said certificate or permit, his agent, servant or employe, or any other person to use or display said identification card after said certificate or permit has been cancelled or disposed of. The identification card provided for herein may be in such form and contain such information as required by the Railroad Commission.

"(f) It shall be unlawful for any owner of a certificate or permit, his agent, servant or employe, to display upon any motor vehicle the certificate or permit number, or

other insignia of authority from the Railroad Commission after said certificate or permit has expired, or has been cancelled.

"(g) It shall be unlawful for any motor carrier (common or contract), or the owner of a certificate or permit, or his agent, servant or employe, directly or indirectly, to offer, permit or give to any person, directly or indirectly, any commission or other consideration to induce such person to deliver to such motor carrier or certificate or permit owner, property to be transported; and it likewise shall be unlawful for any shipper or consignee or his agent, servant or employee, to receive from such motor carrier, directly or indirectly, any such commission or consideration as an inducement to secure the transportation of any such property. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not to exceed two hundred dollars ($200), and each such transaction shall constitute a separate offense.

"(h) Any common carrier motor carrier, his agent, servant or employe who directly or indirectly gives to any shipper any rebate, or any shipper, his agent, servant, or employe who directly or indirectly receives any rebate, shall be guilty of a misdemeanor, and shall be punished by a fine not to exceed two hundred dollars ($200.00) for each offense, in any court of competent jurisdiction in this State. It being the intention of this act that such motor carriers shall in every instance collect and receive, and the shipper shall pay, only the rate or fee prescribed or approved by the Commission.

"(i) If any motor carrier, or any officer, agent, clerk, servant, or employe, or receiver, or his agents, servants, or employe, of any motor carrier operating as a contract carrier in this State, shall, directly or indirectly, or by any special rate, rebate, drawback, or other device, for or on behalf of such contract carrier, knowingly charge, demand, or contract for, collect or receive from any person, firm or corporation a less compensation for any service rendered or to be rendered by any such contract carrier than is prescribed for said service, by said Commission, such contract carrier or any officer, clerk, servant, or em-

ployе or receiver, his agents, servants, or employe of such contract carrier shall be guilty of a misdemeanor, and, upon conviction shall be fined in a sum not to exceed two hundred dollars ($200.00) for each offense; and every person who violates or fails to comply with, or procures, aids or abets any contract carrier in the violation of the provisions hereof, shall likewise be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than two hundred dollars ($200.00) for each offense."

SEC. 18. That Section 17 (a) of said chapter be and the same is hereby amended to read as follows:

"SECTION 17. (a) For the purpose of defraying the expense of administering this act, every common carrier motor carrier now regularly operating, or which shall hereafter regularly operate in this State, shall at the time of the issuance of a certificate of convenience and necessity, unless otherwise provided herein, and annually thereafter, on or between September 1st and September 15th of each calendar year, pay a special fee of ten dollars ($10.00) for each motor propelled vehicle operated or to be operated by such motor carrier in the carriage of property. If the certificate of convenience and necessity herein referred to is issued after the month of September of any year the fee paid shall be prorated to the remaining portion of the year ending August 31st following, but in no case less than one-fourth (¼) the annual fee. In case of emergency or unusual temporary demands for transportation the fee for additional motor propelled vehicles for less period shall be fixed by the Commission in such reasonable amounts as may be prescribed by general rule or temporary order. Every application for a certificate of convenience and necessity shall be accompanied by a filing fee in the sum of twenty-five dollars ($25.00), which fee shall be in addition to other fees and taxes, and shall be retained by the Commission whether the certificate of convenience and necessity be granted or not."

SEC. 19. That Section 18 of said chapter be and the same is hereby amended to read as follows:

"SECTION 18. It shall be unlawful for any motor carrier as hereinbefore defined to operate any motor vehicle within this State unless there shall be displayed and firmly

fixed upon the front and rear of such vehicle an identification plate to be furnished by the Commission. Each of such plates shall be designed so as to identify the vehicle on which the same is attached as being a vehicle authorized to operate under the terms of this law; said plate shall bear the number given to the vehicle by the Commission and such other marks of identification as may be necessary. The plates for common carrier vehicles and the plates for contract carrier vehicles shall be different in design. The identication plates provided for herein shall be in addition to the regular license plates required by law. It shall be the duty of the Commission to provide these plates and each motor vehicle operating in this State shall display such plates as soon as the same are received, and such plates shall be issued annually thereafter and attached to each motor vehicle not later than September 1st of each year, or as soon thereafter as possible. The Commission shall be authorized to collect from the applicant a fee of one dollar ($1.00) for each pair of plates so issued, and all fees for such plates shall be deposited in the State Treasury to the credit of the 'Motor Carrier Fund'."

SEC. 20. That Section 19 (a) and (b) of said chapter be and the same is hereby amended to read as follows:

"SECTION 19. (a) The Commission shall have power to employ and appoint from time to time such experts, assistants, and other help, in addition to its present force, as may be deemed necessary to enable it at all times to properly administer and enforce this act. Such persons and employes of the Commission shall be paid for the service rendered such sums as may be fixed and prescribed by the Commission in monthly installments, and no employe of the Commission shall ask or receive any fee from any person for the taking of acknowledgments or any other service except as herein provided, and such salaries, wages and all fees that may be paid to witnesses and officers shall be paid out of the Motor Carrier Fund by the State Treasurer on warrants of the Comptroller of Public Accounts on order of voucher approved by the Commission or the chairman thereof. All actual and necessary traveling expenses of the members of the Commission and em-

ployes shall also be paid out of said fund in the same manner as salaries, wages and fees when such accounts shall have been itemized and sworn to by the Commission or employe incurring the expenses and approved by the Commission or the chairman thereof.

"(b) If the amount of total fees collected under the provisions of this act shall not be sufficient during any annual period to pay such salaries, costs, charges, fees and expenses, then the deficit shall be paid by the State Treasurer out of any fund not otherwise appropriated. Until sufficient funds have accrued to said Motor Carrier Fund for the payment of expenses, fees, etc., as provided herein, said expenses shall be paid by the State Treasurer out of any funds not otherwise appropriated, such sum to be paid out of the general revenue not to exceed the sum of five thousand dollars ($5000.00) and said sum is hereby appropriated. Any surplus remaining in the Motor Carrier Fund at the end of any fiscal year, after paying such salaries, accounts, fees and charges and after deducting such amounts as may be contracted to be paid and incurred, and such sums as may be reasonably estimated by the Commission for its use pending further collection of fees, shall be paid over to the general revenue fund."

Sec. 21. That Section 22 of said chapter be and the same is hereby amended, by adding thereto a new section, to be known as Section 22b, to read as follows:

"Sec. 22b. Declaration of Policy.—The business of operating as a motor carrier of property for hire along the highways of this State is declared to be a business affected with the public interest. The rapid increase of motor carrier traffic, and the fact that under existing law many motor trucks are not effectively regulated, have increased the dangers and hazards on public highways, and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that congestion of traffic on the highways may be minimized; that the use of the highways for the transportation of property for hire may be restricted to the extent required by the neces-

sity of the general public, and that the various transportation agencies of the State may be adjusted and correlated so that public highways may serve the best interest of the general public."

SEC. 22. All laws and parts of laws in conflict herewith are hereby expressly repealed. Provided, however, that nothing in this act shall be construed as giving legislative sanction to any act that would violate the provisions of the Anti-Trust Laws of Texas.

SEC. 23. If any section, subsection, clause, sentence or phrase of this act is for any reason held to be unconstitutional and invalid, such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause or phrase thereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases be declared unconstitutional.

SEC. 24. The fact that there is at this time a large number of individuals, firms and corporations using the highways of this State for the transportation of property for hire by motor propelled vehicles, and the further fact that the present law does not effectively regulate this extensive business, and the fact that no law adequately protects the public in its dealings with such carriers, and in its use of the highways, creates an emergency and a public necessity requiring the suspension of the constitutional rule which requires all bills to be read in each House on three several days, and that such rule be, and the same is hereby, suspended, and that this act shall take effect from and after its passage, and it is so enacted.

APPENDIX "B"

IN THE

District Court of the United States

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

J. H. STEPHENSON ET AL., Complainants,

vs.

T. BINFORD ET AL., Respondents.

EQUITY No. 479

ASSIGNMENTS OF ERROR

Urged by Complainant and Complainant-Intervenors

In and to Said Honorable Court:

Come now J. H. Stephenson, complainant in the above numbered and entitled cause, and W. S. Finnegan, P. E. Arnett, D. A. Beard, B. E. Ites, V. C. Bilbo, J. T. Carroll and A. S. Robinson, complainant-intervenors in said cause, and, as their grounds and reasons for appealing from the decree of the court entered on June 8, A. D. 1932, respectfully specify the following assignments of error:

I.

The court erred in holding that the requirements of House Bill No. 335, passed by the 1931 Legislature of Texas, are valid and constitutional, and that if complain-

ant and complainant-intervenors desired to conduct their business of transporting commodities as private contract carriers on the highways of the State of Texas, they must comply with all of the provisions of said Act.

II.

The court erred in holding that the Legislature of Texas had the right to deny to complainant and complainant-intervenors the right to operate their vehicles over the highways of the State of Texas as private contract carriers, if the Railroad Commission of Texas should be of the opinion that such operations of complainant and complainant-intervenors "will impair the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory," as is provided in subdivision (c), Section 6 of House Bill 335, passed by the 1931 Legislature of Texas.

III.

The court erred in holding that the State of Texas had the right to deny unto complainant and complainant-intervenors the use of its highways for the purpose of operating upon same as private contract carriers, if complainant and complainant-intervenors did not comply with the orders of the Railroad Commission of Texas, fixing, prescribing or approving the maximum or minimum, or maximum and minimum rates, fares and charges for the transportation services rendered by them, as is provided for in subdivision (a) of Section 4 of said House Bill No. 335, passed by the 1931 Legislature of Texas.

IV.

The court erred in holding that complainant and complainant-intervenors, although private contract carriers, could be compelled by the State of Texas, through its Railroad Commission, to submit to the rates, fares and charges adopted and promulgated by said Commission, and that as an incident to the right of operation as contract carriers, complainant and complainant-intervenors must charge and receive rates in an amount equal to the

minimum rates, fares and charges prescribed for common carriers rendering substantially the same service, and no less.

V.

The court erred in holding that the State of Texas had the right and power to control and regulate the rates to be charged by complainant and complainant-intervenors, although they be private contract carriers, and that upon complainant's and complainant-intervenors' failure to charge the rates prescribed by the Railroad Commission, the State of Texas had the right to deny them the use of its highways,—all as is provided in House Bill No. 335, passed by the 1931 Legislature of Texas.

VI.

The court erred in holding that the State of Texas, through its Railroad Commission, could so control and regulate the charges made and moneys received by complainant and complainant-intervenors for transportation services rendered as purely private contract carriers, that if complainant or complainant-intervenors, directly or indirectly, or by any special rate, rebate, drawback, or other device, should charge, demand or contract for, collect or receive, a less compensation for any services rendered, or to be rendered, than is prescribed for said services by the Railroad Commission of Texas, they would be guilty of a misdemeanor and upon conviction would be subject to a fine not to exceed Two Hundred Dollars for each offense, as is provided in subdivision (i) of Section 17 of said House Bill 335, passed by the 1931 Legislature of Texas.

VII.

The court erred in holding that complainant and complainant-intervenors, although private contract carriers, could be compelled to carry insurance covering loss of or damage to cargo, as a prerequisite to receiving permission to operate their vehicles as such contract carriers over the highways of the State of Texas, as is prescribed in Section 13 of said House Bill 335.

VIII.

The court erred in holding that subdivision (d) of Section 6 of said House Bill 335, giving the Railroad Commission of Texas authority to issue upon application to those persons who desired to engage in the business of transporting for hire over the highways of the State of Texas, livestock, mohair, wool, milk, feedstuffs, household goods, oil field equipment, timber when in its natural state, farm machinery and grain, special permits upon such terms, conditions and restrictions as the Railroad Commission may deem proper, and to make rules and regulations governing such operations,—keeping in mind the protection of the highways and the safety of the traveling public,—was not discriminatory against and did not deny to complainant and complainant-intervenors the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

IX.

The court erred in refusing to hold subsection (d) of Section 4 of said House Bill 335, passed by the 1931 Legislature of Texas, discriminatory against complainant and complainant-intervenors, and as denying to them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that the operators of complainant's and complainant-intervenors' trucks are required to obtain drivers' licenses, whereas, persons, firms and corporations owning their own trucks and transporting their own commodities are not required to obtain licenses for the drivers operating their trucks over the highways of the State of Texas.

X.

The court erred in refusing to hold Section 6-cc of said House Bill 335, passed by the 1931 Legislature of Texas, discriminatory against complainant and complainant-intervenors, and as denying to them the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that by said provisions complainant and complainant-intervenors are pro-

hibited from permitting the operators of their trucks to drive said trucks for a period longer than prescribed therein, whereas, the many persons, firms and corporations owning their own*ing* trucks and transporting their own commodities are not required to abide by such regulation,—there being no reasonable basis for such a classification and discrimination.

XI.

The court erred in refusing to hold that Section 13 of said House Bill 335, passed by the 1931 Legislature of Texas, was discriminatory against and denied to complainant and complainant-intervenors the equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, in that said section compels complainant and complainant-intervenors to obtain certain policies of insurance before they can lawfully operate upon the highways of the State of Texas, and which said policies of insurance are not required for persons, firms and corporations owning and operating motor vehicles over the highways of the State of Texas, and transporting their own commodities, thus bringing about an arbitrary designation and pointing out of complainant and complainant-intervenors.

XII.

The court erred in holding that Section 14 of said House Bill 335, passed by the 1931 Legislature of Texas, was not discriminatory against and did not deny to complainant and complainant-intervenors the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that said section vests the Railroad Commission of Texas with power and authority, and makes it its duty, to approve or disapprove the nature and character of the equipment to be used under any permit or certificate, and the amount and character of tonnage which may be hauled thereunder on any motor vehicle, trailer or semi-trailer used by complainant and complainant-intervenors, and to fix the number and size of boxes, packages, barrels or bales of any particular

commodity transported by them,—and which said regulations are not applied to or imposed upon persons, firms, or corporations operating trucks over the highways of the State of Texas in the carriage of commodities belonging to them.

XIII.

The court erred in holding that the State of Texas had the right to deny complainant and complainant-intervenors the use of the highways unless they obtained a permit, which is, under the provisions of House Bill 335, in effect a certificate of public convenience and necessity, unless complainant and complainant-intervenors submitted themselves to regulations and conditions which are unconstitutional, denying to complainant and complainant-intervenors the equal protection of the laws and depriving them of their property without due process of law, all in violation of the Fourteenth Amendment to the Constitution of the United States; and although the court be correct in saying that the right of complainant and complainant-intervenors to the use of the highways is a mere privilege (which is not admitted), the grant of the State of Texas to use them cannot be predicated and based upon unconstitutional conditions and regulations.

XIV.

The court erred in refusing to hold the provisions of said House Bill No. 335, passed by the 1931 Legislature of Texas, as applied to complainant and complainant-intervenors, an unwarranted and unjust interference with their private right of contract, and, accordingly, resulting in a deprivation of their property without due process of law.

XV.

The court erred in holding that as a matter of law House Bill No. 335, passed by the 1931 Legislature, and which bacame a law of the State of Texas on August 22, 1931, as construed and applied to complainant and complainant-intervenors, was a lawful and constitutional statute.

XVI.

The court erred in finding as a fact that: "The legislature, in effect, found that the regulation of the minimum rates of contract motor carriers is necessary in the public interest to conserve and maintain an adequate transportation system capable to serve the entire needs of the people of the State, and we think the evidence supports this finding" (Finding of Fact No. XII), for the reason that the same is an unwarranted conclusion on the part of the court, wholly unsupported by any evidence.

XVII.

The court erred in finding as a fact that: "The legislature has declared that all of the available carriage service, including common carriage by rail and road and contract carriage by road, are so inter-dependent that the public may not continue to have a safe and dependable transportation system unless private carriers operating on the same roads with common carriers are brought under just and reasonable regulation bringing their service into relation with common carriers, and we find the evidence supports this finding" (Finding of Fact No. XXV), for the reason that this finding is an unwarranted conclusion by the court—there being no evidence in the record to support it.

XVIII.

The court erred in holding that: "The granting to the Commission of the power to grant or refuse a permit to a contract carrier upon a determination of whether the efficient public service of any authorized common carrier or common carriers then adequately serving the same territory will be impaired, the power to fix minimum rates to be charged by contract carriers, which rates shall not be less than those charged common carriers for substantially the same service, the forbidding of rebate, and discrimination by contract carriers, and the requiring that contract carriers keep books of account and make reports to the Commission, are reasonable regulations reasonably designed to effect the State's declaration of purpose and

policy that the use of the highways by motor carriers for hire is a business affected with the public interest" (Finding of Fact XXVIII), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling said complainanat and complainant-intervenors to dedicate their property to a quasi public use, and is in effect converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XIX.

The court erred in holding that: "The legislature has declared that the business of operating as a motor carrier of property for hire along the highways of Texas is a business affected with the public interest, and we think the evidence not only does not overcome, but, on the contrary, supports this declaration" (Finding of Fact No. XXIX), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is in effect converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XX.

The court erred in finding that: "We find that the legislature has found that this system of regulation is designed in the interest of public convenience, and that it will operate to bring highway order out of highway chaos, by preventing a further disintegration of the all but practically destroyed common carrier service on the road, and that the exercise of the powers which the act confers will not only protect the highways and the people on them from the

results of reckless and careless operations, but will give the whole people of the State a safe and dependable system of transportation for the carrying of their freight by highways. The legislature having so found, we find nothing in the evidence to overthrow the finding or to make it appear unreasonable" (Finding of Fact No. XXXII), for the reason that this finding is an unwarranted conclusion by the court.

XXI.

The court erred in holding that: "It is our opinion that the State has the power to, and it has declared that the business of operating for hire on the public roads of Texas is a business affected with the public interest, and that it may not be conducted except under legislative grant" (Conclusions of Law, I), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXII.

The court erred in holding that: "That it has the power to affix and it has affixed to the franchises which must be obtained in order to conduct the business, reasonable conditions" (Conclusions of Law, II), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a guasi public use, and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXIII.

The court erred in holding that: "That the legislature has not undertaken to convert private carriers into common carriers by any kind of fiat, and it has not imposed arbitrary restrictions upon the business of persons using the highways" (Conclusions of Law, III), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXIV.

The court erred in holding that: "That it merely has done what it has a right to do, asserted its will as to the conditions under which persons who use the public roads in the conduct of their business may obtain a franchise to use them, and that the exercise of such powers has not, in any manner, transgressed the Fourteenth Amendment" (Conclusions of Law, IV), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

XXV.

The court erred in holding that: "That the legislature has, by a comprehensive legislative program, consisting of the acts in question here, and other acts not now under review, undertaken to remedy the mischiefs incidental to

the unregulated use of the highways, and that the challenged act represents the reasonable exertion of the State's power over its highways and over those who use them to conduct their business thereon" (Conclusions of Law, V), for the reason that such a holding as applied to the status of complainant and each complainant-intervenor is tantamount to compelling them to dedicate their property to a quasi public use, and is, in effect, converting them into a public agency, when they are desirous of operating as private carriers, and by reason thereof deprives complainant and complainant-intervenors of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

In Addition to the Above Assignments of Error, Complainant-Intervenor D. A. Beard also Specifies the Following Assignments of Error.

XXVI.

The court erred in holding that the rate features of the act constituted highway regulation in any permissible sense of protecting the highways or the public upon the highways. Indeed, the rate feature of the act whereby a private contract carrier, such as intervenor for the Peden Company, must charge the common carrier rate, is in no sense highway regulation for the protection of either the highways or the public upon them, and has no relation to that end, but is purely arbitrary provision under the guise of highway regulation, in order to interfere with the rights of private contract in the interest of common carriers.

XXVII.

The court erred in holding that intervenor Beard holds himself out to the public for all the carriage upon the highways he may get to do, and in suggesting that there is "more than a little question" as to whether he is not a common carrier. Such a holding is wholly gratuitous and

without basis of fact, and without a scintilla of evidence to support it. On the direct contrary, the intervenor is seeking to protect by his intervention herein only his private contract with Peden Company under which he seeks alone to protect merely his right to do a portion of the private hauling of Peden Company between its warehouses and to make deliveries to a portion of its retail customers from time to time. Therefore, the statement of the court in its opinion is in serious error, and highly prejudicial, and the suggestion that he seeks herein under the form of a contract carrier to become a common carrier is without the slightest basis.

XXVIII.

Since there is nothing in the act under attack to prevent the Peden Company from transporting over the public highways of the State by motor vehicle its own commodities between its warehouses and to its customers, the Peden Company and intervenor constitutionally have the right to contract for intervenor to perform the service which Peden Company may under the act legally perform. The court, therefore, erred in holding that such contract between them may not be performed without a permit from the Railroad Commission, and only upon a finding by it that the performance of the same would not impair the efficient public service of any common carrier then adequately serving the same territory, and, moreover, that such transportation may not be performed unless the common carrier tariff is charged and paid.

XXIX.

The court erred in holding that the act does not apply to the use of roads for hire by individuals who are not in the general business or carriage for hire, but who as mere agents for another make a charge for hauling upon the highways, in the very face of the contrary language of the act itself which specifically makes all its provisions directly applicable to every person *"operating any motor-propelled vehicle used in transporting property for compensation or hire over any public highway in this State,"*

except within incorporated cities or towns. The construction, therefore, which the court gives to the act to sustain its constitutionality is in the very teeth of the act itself.

WHEREFORE, complainant and complainant-intervenors pray that the decree of the court denying them the permanent injunction prayed for be in all things reversed, and that the temporary injunction prayed for by them be granted.

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